IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.287 OF 2006
WITH
CIVIL APPLICATION NO.373 OF 2006

Harjit Kaur Arora & Ors. ..Appellants.

V/s.

Manjit Singh Arora. ..Respondent.

Mr.Anil Singh with D.R.Shah for appellants.

Mr.G.S.Bhat for respondent.

CORAM: A.M.KHANWILKAR,J

DATE : JUNE 12, 2006.

P.C. :

1. Heard counsel for the parties. Perused the relevant documents on record.

2. Admit.

3. Mr.Bhat waives notice for respondent. As short question is involved, appeal is taken up for final disposal forthwith by consent.

4. This appeal from order takes exception to the Judgment and order passed by the City Civil Court, Bombay, on Notice of Notice of Motion No.4241 of 2004 in Short Cause Suit No.4952 of 2004, dated March 7,

2006, dismissing the Notice of Motion, preferred by the appellants. The appellants have instituted suit against the respondents for the following reliefs :

> "(a) that this Honourable Court be pleased to pass a permanent order and injunction restraining the defendant by himself and/or his family members or through any person or persons claiming through or under him from preventing the plaintiffs free egress and ingress to the second floor premises and also the terrace and to other common areas in the property viz. 3-B, Dashmesh Colony, N.D.Marg, Four Bungalows, Andheri(West), Bombay 400 053, to be used in common without any obstruction and interference from the Defendant;
>
> (b) that an Architect be appointed from the panel of this Hon'ble Court to visit site and submit a report with regard to the extract position of the second floor and how best it can be used equally between the Plaintiffs and Defendant and thereafter the premises on the second floor be divided equally for use by the defendant and plaintiffs separately and distinctly;
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> (c) that ad interim and interim reliefs in terms of prayer clauses (a) & (b) above be granted;
>
> (d) that cost of this suit be provided for;
>
> and
>
> (e) that such other and further reliefs as the nature and circumstances of the case may require be granted;"

During the pendency of the said suit, the appellants took out Notice of Motion for relief of injunction against the respondents in the following terms.

(a) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to pass a temporary order and injunction restraining the Defendant by himself and/or his family members or through any person or persons claiming through or under him from preventing the Plaintiffs free egress and ingress to the second floor premises and also the terrace and to other common areas in the property viz. 3-b, Dashmesh Colony, N.D.Marg, Four Bungalows, Andheri (west), Mumbai 400053, to be used in common without any obstruction and interference from the Defendant;

(b) that pending the hearing and final disposal of the Suit, an architect be appointed from the panel of this Hon'ble Court to visit site and submit a report with regard to the exact position of the Second floor and how best it can be used equally between the Plaintiffs and Defendant and thereafter the premises on the second floor be divided equally for use by the Defendant and Plaintiffs separately and distinctly;

(c) that ad-interimj and interim reliefs in terms of prayer clauses (a) & (b) above be granted;

(d) that cost of this Notice of Motion be provided for;

and

(e) that such other and further reliefs as the nature and circumstances of the cased may require be granted;

The basis on which the appellants have asserted right to the property amongst other are the documents executed by the predecessor of the parties dated 10th February, 1988, executed between the Dalipsingh Hardit Singh and on the other hand, Inderjit Singh

and Manjit Singh, both sons and legal heirs of the original purchaser Nihalsingh. Reliance is also placed on the document executed between the parties in private mediation proceedings dated 1st February, 2004. There are other documents and circumstances on record on the basis of which it is asserted by the appellant/plaintiff that they are the co-owners in the suit property. The ground floor is occupied by the appellants and the first floor of the structure is occupied and enjoyed by the respondents. The second floor according to the appellants is partly shared by the parties. There are two rooms in possession of the appellants and there are two rooms in possession of the respondents. It is also the case of the appellants that the terrace portion is commonly shared by the parties. On this basis reliefs have been claimed in the above terms. The trial Court however, non-suited the appellants by dismissing the Notice of Motion essentially for two reasons. Firstly, that the suit in substance was for partition and secondly, the relief claimed was for mandatory injunction. It is fairly accepted by the counsel for the respondent that no third reason is mentioned in the impugned Judgment. The question which arises before this Court is whether these two reasons can be accepted as good reasons in the fact

situation of the present case. In my opinion, after having gone through the relevant documents on record prima facie, it is not possible to suggest that the relief claimed in the suit instituted by the appellants is only for relief of partition and mandatory injunction. On the other hand on fair reading of the pleadings, it appears that the suit is for injunction and not for partition. Indeed, for the nature of arrangement which is already enjoyed by the parties and agreed upon by the parties, the appellants would be entitled to relief of injunction requiring the respondents to restrict the enjoyment of property in terms of arrangement agreed between them. If such relief is claimed, it cannot be said to be relief of partition or of mandatory injunction. As the joint ownership of the property would nevertheless remain between the parties while resolving contentious issues as to whether the concerned property is in exclusive possession of the respondent and whether the arrangement which is referred to by the appellants has been worked out between the parties as is alleged. All these aspects in my opinion, will have to be answered by the trial Court in the first instance. It is only thereafter, the correctness of those findings can be agitated before this court. This court will have the

advantage of a reasoned order of the trial court on those contentious issues between the parties. Understood thus, the only course for this court is to set aside the impugned order and restore the Notice of Motion to the file of the trial Court to its original number to be heard and decided on its own merits in accordance with the law. All questions on merits are kept open. Appeal succeeds on the above terms. No order as to costs.

5. Parties shall appear before the trial court on 10th July, 2006, on which date the trial court shall assign appropriate date in the matter for hearing or if so advised, will proceed to hear the parties and finally dispose of the notice of motion on the same day. In any case Notice of Motion will have to be finally disposed of as early as possible not later than 31st August, 2006. Till the notice of Motion is finally disposed of, parties are directed to maintain status quo as of today with regard to the suit property.

6. It will be open to the trial court to pass appropriate order as may be advised, if the appellants insist for any specific relief in view of any urgency, otherwise the trial court may decide the

notice of motion finally before the 31st August, 2006.

7. Appeal as well as civil application disposed of accordingly.